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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 955

T. Y. FONG, INDIVIDUALLY AND TRADING AS ASIA DEVELOPMENT CORPORATION AND AS HONG KONG SHIPPING CORPORATION, LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–23) is reported at 300 F. 2d 400. The opinion of the district court (R. 221–230) is reported at 182 F. Supp. 446.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1962 (Pet. App. 1–23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court abused its discretion in entering and refusing to vacate a default judgment against petitioner.

2. Whether, where the court entered a default on the issue of liability because of petitioner's willful failure to appear for deposition, petitioner was entitled under Rule 55(b)(2) of the Federal Rules of Civil Procedure to a trial on the allegations of liability in the complaint.

3. Whether, where the government brought an action against petitioner alleging, *inter alia*, a violation of the False Claims Act and petitioner was arrested and released on bond pursuant to the provisions of that Act, 31 U.S.C. 233, the district court's decision to reserve until trial its judgment on a motion to dismiss the claim deprived petitioner of rights guaranteed by the Constitution.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

* * * * *

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper notice of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

RULE 55. DEFAULT

* * * * *

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

STATEMENT

On February 10, 1962, the court of appeals affirmed the decision of the district court which (1) entered a default judgment against petitioner; (2) awarded the United States $516,000 liquidated damages; and (3) deleted a previous award of an additional $511,000 actual damages in favor of the United States.[1] Petitioner seeks review of that decision to the extent that it affirmed the default judgment and award of $516,000 liquidated damages.

1. *The pleadings.* The action was commenced on December 31, 1956, when the United States filed a complaint seeking recovery of $764,000 damages under the False Claims Act (31 U.S.C. 231 *et seq.*) for alleged violations of a contract with the government to scrap 15 surplus vessels located in the Subic Bay

[1] The government has determined not to file a conditional cross-petition for certiorari to contest the striking of the award of actual damages because we believe that the case does not warrant the attention of this Court. However, to avoid any misunderstanding on the part of petitioners, we should state that if, contrary to the position urged in this brief in opposition, the Court should decide to hear this case and should ultimately reverse the judgments below, the United States would pursue its claims for actual damages, as well as liquidated damages, in the ensuing trial proceedings.

Reserve Fleet, Philippine Islands (R. 15–46). Pursuant to the provisions of that Act, 31 U.S.C. 233, the United States sought, and the district court ordered, petitioner's arrest on grounds that he was temporarily in this country, had immediate plans to leave and had no known assets here under his name which were subject to levy (R. 46–50).

The district court fixed bail at $50,000 (R. 48–49) and ordered that this sum be deposited in the registry of the court as security for Fong's "appearance * * * at all depositions, hearings and proceedings * * * and as security * * * that defendant will pay any judgment entered against him in accordance with the provisions of his personal bond * * *" (R. 50–51, 53–55). Petitioner was released on January 2, 1957, upon a personal bond in which he expressly agreed that (1) he would appear in court in accordance with all notices and orders, (2) he would remain within certain judicial districts in this country unless permission to leave were granted by the court and (3) he would pay any judgment to be entered against him and in favor of the United States (R. 51–53).

Following a motion of June 3, 1957 by petitioner to dismiss the complaint (R. 4), the government on July 11, 1957, filed an amended complaint (R. 55–74). This complaint, alleging the same facts on which the original complaint was founded, set forth four separate counts for damages: (1) for violation of the False Claims Act, 31 U.S.C. 231 *et seq.*; (2) for violation of the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1611 *et seq.*; (3) for conversion; and (4) for breach of contract. The allegations of the complaint were as follows:

Petitioner purchased from the United States 15 vessels which were lying in Subic Bay, Philippine Islands (R. 59–60). He paid $271,000 for them. The purchase contract required petitioner to scrap the vessels within prescribed time limits (R. 31–60) and recited that time was "of the essence" (R. 60, 33). It provided that in the event the vessels were not scrapped within the prescribed time limits, petitioner would pay specified liquidated damages, and the government could terminate the contract and repossess the unscrapped vessels (R. 34–37, 61–62).

Contrary to his obligations under the contract, petitioner himself never scrapped any of the 15 vessels. Instead, he sold at least 13 of them, as vessels, for $1,587,500 (R. 62, 67); 3 were scrapped by vendees within an extension of time, applicable only to them (R. 64, 73); the 12 others were not scrapped within the specified time limits, although 5 of these were ultimately scrapped by petitioner's vendees. There was no evidence that the remaining 7 vessels were ever scrapped by anyone (R. 62–64). On August 2, 1957, petitioner answered the amended complaint, generally denying the allegations and asserting certain affirmative defenses (R. 94–97).

On July 12, 1957, petitioner moved to dismiss the False Claims Act count of the amended complaint for failure to state a claim on which relief could be granted (R. 75–94). After a hearing, the district court on December 4, 1957, exercising its discretion under Rule 12(d), F.R. Civ. Proc., reserved judgment on the motion. It observed that the resolution of the claim would necessitate factual inquiries and that trial

of the other three counts of the complaint would require presentation of most of the evidence material to the first count (R. 113–118).

2. *Petitioner's deposition.* Prior to the court's ruling on the motion to dismiss, the government commenced taking the deposition of petitioner in San Francisco (R. 269–294).[2] On July 23, 1957, the deposition was recessed to be resumed on ten days' notice to the petitioner (R. 269, 143). On September 4, 1957, however, counsel for petitioner informed the district court and the government that petitioner was "believed to have fled" the United States (R. 5, 99) and that they were unable to locate him through members of his family in this country and Canada (R. 105–107).

On January 17, 1958, the government filed notice of the resumption of petitioner's deposition in San Francisco on February 17, 1958 (R. 122–123). In hearings before the court on February 5 and 17 on resumption of the deposition, defense counsel stated that they had not been able to communicate with petitioner, but that they had been advised that he was somewhere in Europe (R. 294, 299–311). They proposed to have the deposition continued by written interrogatories (R. 301), but gave no reason[3] for petitioner's leaving the jurisdiction or for his continuous failure to appear in response to the district court's process. The court declared that it would not be amenable to any motion to discontinue the oral deposition; that peti-

[2] The government filed a notice of petitioner's deposition on July 11, 1957, the day the amended complaint was filed (R. 4).

[3] Petitioner's counsel did surmise that petitioner might have been "frightened" by the proceedings against him (R. 304).

tioner was "footing around all over," apparently did not want to answer inquiries on the subject of the lawsuit, and, based on his previous behavior during the taking of his deposition, should be kept, on resumption of the oral deposition, close to the control of the court (R. 307–308). The court, however, granted petitioner an extension of ten days to February 27, 1958, for resumption of the deposition (R. 311).

On February 25, 1958, eight days after petitioner had been reported to the court as somewhere in Europe, petitioner wired the court from Santiago, Chile, that he would "answer interrogatories in writing in Montevideo, Uruguay," where he would be before the end of February (R. 129, 313). He gave no reason for his prolonged absence nor any explanation of his extensive travels.

On February 27, 1958, defense counsel moved to resume petitioner's deposition solely by written interrogatories (R. 313–323). Two affidavits were submitted in support of the motion: One, by defense counsel, Robert J. Drewes, reciting his version of some of the prior proceedings in the case in an effort to demonstrate fear or intimidation as the basis of Fong's actions (R. 125–128), and a second, by a Doctor Luttgens, stating that in June and July 1957, before Fong had fled to Europe, he had treated Fong for an ulcer and hepatitis and told Fong to restrict his traveling (R. 129–130).

The district court, noting defendant's continued, unexplained disregard of its process (R. 316–318), denied the motion (R. 323). In so doing, it laid

particular emphasis on the fact that the deposition had been initiated in the United States, was to be resumed, with the agreement of all parties, in the United States, and that only defendant's fleeing the country made this impossible (R. 316–318). As to his alleged disability or illness, the court noted (R. 320):

> His home is in São Paulo [Brazil] * * *. He sent a wire from Santiago, Chile, which is on the other side of South America, says he will be in Montevideo, Uruguay, to have his deposition taken. That's some itinerary and is not particularly indicative of any substantial disability on his part.

3. *The default judgment.* On March 10, 1958, the government moved, pursuant to Rule 37(d), F.R. Civ. Proc., to strike petitioner's answer and for an order of default against him (R. 130–140), predicated on his wilful failure to appear for the resumption of his deposition. In opposition, petitioner offered an affidavit by his counsel reporting a telephone conversation with Fong on March 10, 1958 (R. 140–143). According to the affidavit, counsel informed Fong that (1) the court had denied their request that further testimony be taken by written interrogatories (R. 141); (2) the government had asked the court to strike the answer to the complaint "and to enter a judgment by default for the full amount of the damages as set forth in the Amended Complaint" (R. 141); and (3) that the government's motion would be heard on March 13, 1958, and "that there would be nothing before the Court to show that his absence from the continuation of the deposition was not wilful" (R. 141). The affi-

davit then stated that the reasons given by Fong for not returning were fear of government counsel's "personal animosity" and that he would have to put up a larger bond and might be rearrested if he returned. The affidavit did not state (1) that Fong had mentioned illness or disability as a reason for not returning or (2) that Fong did not understand the seriousness and the consequences of a default occasioned by his continued refusal to return.

After a hearing on the government's motion (R. 323–326), the court found that petitioner had wilfully failed to appear on the date set for his deposition; accordingly, it struck his answer and ordered a default on the question of liability, leaving open to both sides the opportunity for trial on the question of damages (R. 323–326, 143–145). The order allowed petitioner to move to vacate the entry of default upon a proper showing (R. 143–145).

On April 22, 1958, defense counsel moved to vacate the order of default (R. 145–146), stating that petitioner was willing to complete his deposition in Argentina and to pay for the costs of government counsel in continuing the discovery proceedings in South America (R. 154–155). Defense counsel reasserted that fear and ignorance of the true nature of the proceedings against him were the basis for Fong's prior failure to appear (R. 154–156). An affidavit of a South American physician stated that as of April 10, 1958, he felt that Fong should not travel because of a stomach ulcer (R. 153).

At the hearing on this motion on April 28, 1958 (R. 326–345), the court reiterated its previous views

and noted that present illness was no basis for explaining Fong's fleeing the United States and traveling extensively in Europe and South America prior to and including February 27, 1958 (R. 340–345). As to his supposed fear or ignorance of the judicial proceeding and the actions of the government, the court pointed out that Fong was an extremely "astute" individual "who took it upon himself to limit the extent of his own examination at some points in the deposition" (R. 341–342).

4. *The damages.* A trial on the issue of damages was held on July 7 and 8, 1958, at which both parties offered documentary exhibits in addition to testimony of witnesses (R. 345–351). On February 11, 1959, the district court entered its findings of fact and conclusions of law establishing Fong's liability to the government in the total amount of $1,027,000 of which $516,000 covered the claim for liquidated damages, and $511,000, the claim for actual damages under the government's action for breach of contract[*] (R. 230–241, 241–242). The court determined that: (1) the default established the truth of all well pleaded factual allegations; (2) petitioner was the real defendant, having used the two corporations (*i.e.*, Asia Development and Hong Kong Shipping) as mere conduits in carrying on his business; (3) the government was entitled to recover liquidated damages of $43,000 for each of the 12 vessels not scrapped by

[*] In an "order for judgment" of December 30, 1958 (R. 221–230), the court ruled that, in view of the government's willingness to accept damages alternatively and in view of the court's doubts whether the first three counts of of the complaint state a claim upon which relief could be granted, liability would be predicated on the breach of contract count (R. 223).

petitioner or his vendees within the specified time limits, or $516,000; and (4) the government was also entitled to $511,000 actual damages, measured by the total resale price received by the petitioner for 5 of the vessels which were never scrapped and as to which petitioner had deprived the government of its contractual right to repossess.

Thereafter, petitioner moved for a new trial, to set aside the judgment by default and to amend the judgment to strike the awards of liquidated and actual damages. On June 3, 1959, the district court denied the request for a new trial and refused to vacate the default or damage award (R. 251). The court, however, did strike the award for $511,000 actual damages, believing that such action was required by Rule 54(c), F.R. Civ. Proc.

Petitioner then appealed from that part of the district court's judgment entering the default and awarding liquidated damages and the government cross-appealed the deletion of the actual damage award. The court of appeals affirmed the district court's disposition of the case in all respects. With respect to the propriety of the default judgment, the court noted (Pet. App. 12; 300 F. 2d at 408–409) that it had "carefully reviewed those statements as to defendant's health" and defendant's extensive travel itinerary from San Francisco to Boston, to Montreal, Canada, "to Europe and thence to four different nations on the west and east sides of South America" and concluded that (Pet. App. 13):

> The Trial Court was amply justified in disbelieving defendant's excuses because obviously they were not made in good faith and were not

trustworthy. In fact, the whole course of defendant's conduct conclusively shows his long sustained willful disregard of the Trial Court's orders and his contumacious attitude towards the Court's authority.

ARGUMENT

Petitioner's "contumacious attitude towards the Court's authority" (Pet. App. 13), his open and flagrant defiance of the discovery proceedings, and his refusal to return or even to continue his deposition except upon terms that he attempted to dictate, justified the entry of the default judgment against him. Indeed, a failure to enter such a judgment would have meant abandonment of the only effective sanction to enforce compliance with discovery proceedings. None of petitioner's arguments militate against the correctness of the decisions below. Nor is there a conflict with any prior decisions of other courts. Hence, review by this Court is not warranted.

1. Petitioner urges that the action of the district court below in entering and refusing to vacate the default judgment constitutes such an abuse of discretion as to amount to a constitutional deprivation of due process (Pet. 2, 21–22). There was, however, no abuse of discretion here. As the court of appeals noted (Pet. App. 12, 300 F. 2d 408–409), after "carefully review[ing]" the record, petitioner's conduct fully justified the entry of the default.

Under Rule 37(d) of the Federal Rules of Civil Procedure (*supra*, p. 2), the district court "may" enter a default judgment against a party who "wilfully" fails to appear for the taking of a properly noticed deposition. Once such a default has been

entered, under Rule 55(c) (*supra*, p. 3), a party seeking to vacate the judgment must show that there was good cause for his default. *Jackson* v. *Heiser*, 111 F. 2d 310, 313 (C.A. 9); *Michigan Window Cleaning Co.* v. *Martino*, 173 F. 2d 466 (C.A. 6); *Ferraro* v. *Arthur M. Rosenberg Co.*, 156 F. 2d 242 (C.A. 2). As Barron and Holtzoff observe (3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1217, pp. 89–91):

> * * * the rules which require responsive pleadings within a limited time serve important social goals; and a party should not be permitted to flout them with impunity. In balancing [the] policies, the court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was a good reason for the default and that he has a meritorious defense to the action. However, the fact that defendant has a meritorious defense does not justify setting the judgment aside if no good excuse for the default is shown. The merits of the controversy will not be considered unless an adequate reason for the default is shown.

To the same effect, see 6 Moore's *Federal Practice* (2d ed.), § 55.10[2], p. 1831.

At no time has petitioner ever made a showing of good cause for his default. Thus, after the adjournment of petitioner's deposition in July 1957, petitioner, according to his attorneys (R. 5, 90), "fled" the country despite his undertaking, given in his bond, that he would make himself available for all discovery proceedings (R. 51–53). Although the resumption of the deposition was properly noticed on January

17, 1958, and a further adjournment to February 27, 1958, was granted, he did not communicate with the court until February 25, 1958, two days before the adjourned date for the resumption of the depositions and, then, only to wire from Santiago, Chile, without further explanation, that he "would answer interrogatories in writing in Montivedeo, Uruguay," where he would be at the end of February (R. 129, 313).

Petitioner's conduct cannot be squared with the explanation proffered by his attorneys. The alleged restriction upon his traveling in June 1957 because of a peptic ulcer (R. 129–130) is contradicted by the fact that between that date and February 27, 1958, he travelled from San Francisco to Boston, to Montreal, to Europe, to Sao Paulo, Brazil, to Santiago, Chile, whence he informed the court he intended to go to Uruguay. As the district court noted (R. 320), this itinerary was "not particularly indicative of any substantial disability on his part." And as that court further observed (R. 341–342), the allegation (R. 125–128) that he was intimidated by the harshness of the government's previous examination and his unfamiliarity with American court processes is without substance in light of the fact that petitioner is an "astute" individual; he had previously undertaken to limit his own examination on deposition; and the protection of the district court was available to him to prevent any such abuse.[5]

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[5] Nothing in *Societe Internationale* v. *Rogers*, 357 U.S. 197, (Pet. 22) is to the contrary. In that case the courts concluded that there had been a "good faith" effort to comply with a pretrial production order.

2. The cases are directly contrary to petitioner's assertion (Pet. 23-24) that, notwithstanding his default, he was entitled under Rule 55(b)(2) to a trial not only on damages but on the allegations of liability as well.[6] *E.g.*, *Massa* v. *Jiffy Products Co.*, 240 F. 2d 702 (C.A. 9); *Peitzman* v. *City of Ilmo*, 141 F. 2d 956 (C.A. 8), certiorari denied, 323 U.S. 718; *Northwestern Yeast Co.* v. *Broutin*, 133 F. 2d 628 (C.A. 6); *Creedon* v. *Randolph*, 165 F. 2d 918 (C.A. 5); *United States* v. *Borchers*, 163 F. 2d 947 (C.A. 2), certiorari denied, 332 U.S. 811. These cases adhere to the self-evident proposition, challenged by petitioner without mention of these decisions, that a default on liability means that a defendant, like Fong, who, because of his willful behavior is defaulted, may no longer contest that issue.

The disposition of the issues by the court below fully accords with long-settled default procedure under the federal rules. As noted in 3 Barron and Holtzoff, *Federal Practice and Procedure*, § 1216, pp. 85-86:

> A hearing to determine whether to enter judgment by default [under Rule 55(b)(2)] is not considered a trial. If the court determines that the defendant is in default, his lia-

[6] The cases on which petitioner relies (Pet. 23) do not support his contention that, despite entry of a default against a defendant, a plaintiff must prove the truth of the factual allegations in his complaint. *Craig* v. *Lovell*, 109 U.S. 194, and *Pope* v. *United States*, 323 U.S. 1, hold that in a default case the well-pleaded factual allegations of the complaint are taken as true, but that there still remains the question of whether these facts, as pleaded, constitute a cause of action. There is no question here that the facts in the government's amended complaint establish a cause of action.

> bility to the plaintiff is deemed established and the plaintiff is not required to establish his right to recover. The allegations of the complaint except as to the amount of damages, are taken as true. If the default is established, the defendant has no further standing to contest the merits of plaintiff's right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery.

Accordingly, on the basis of the amended complaint (the record on liability in this default case), the court correctly found (1) that Fong had breached the contract, *inter alia*, by failing to scrap, or by failing to show that anyone had scrapped, 12 of the 15 vessels within 181 days after the time limits prescribed by the contract, and (2) that Fong was a real party defendant since he completely dominated and controlled the two defendant corporations, using them as mere conduits to carry on his business (R. 56–57).

3. There is no substance to petitioner's claim that the bond placed an unconstitutional restriction on his right to travel or that the court's refusal to determine in advance of trial his motion to dismiss the False Claims Act count, under which the bail had been set, was a violation of his rights (Pet. 24–26). The short answer to the first assertion is that the bail was set by the court in accordance with the provisions of the False Claims Act, 31 U.S.C. 233, when the government showed to the court's satisfaction that petitioner was temporarily in the United States, planned to leave almost immediately and had no known assets here under his name which were subject to levy (R. 46–50).

Petitioner himself proved the wisdom of the court's determination when he breached the terms of his bond and fled to South America only nine months later. Further, the restriction on petitioner's right of travel, of which he complains (Pet. 24), was not imposed by the court (R. 50–51, 53–55), but was included in the bond proposed by petitioner (R. 51–53). The court's order for bail imposed no limitation on petitioner's right to travel beyond the requirement that he appear "at all depositions, hearings and proceedings * * *" (R. 50–51).

Nor did the court's determination to reserve until trial its ruling on the motion to dismiss deprive petitioner of any rights guaranteed by law. While the ruling meant a delay in determining the statutory basis of the False Claims Act count, as petitioner contends (Pet. 24), this is envisioned by the federal rules and is a necessary part of the orderly procedures which they establish. Thus, the complexity of the cause, the fact that appraisal of the claim "necessitates factual inquiries" and "cannot and should not be made upon the pleadings alone" and that there would have to be, in any event, a trial on the other three counts (R. 117–118) clearly warranted the court's exercise of the discretion afforded by Rule 12(d), F.R. Civ. Proc., to reserve judgment on the motion. *Montgomery Ward & Co. v. Schumacher,* 3 F.R.D. 368 (N.D. Calif.); *United States* v. *Central States Theatre Corporation,* 159 F. Supp. 552 (D. Neb.); *Kaus* v. *Huston,* 35 F. Supp. 327 (N.D. Iowa); *Sbicca-Del Mac, Inc.* v. *Milius Shoe Co.,* 36 F. Supp. 623 (D. Mass.). See, also, 2 Moore's *Fed-*

eral Practice (2d ed.), § 12.16, pp. 2274–2277.[1] Further, since petitioner had fled the country and breached the conditions of his bond before the court had an opportunity to rule on his motion to dismiss, he is in no position to complain that thereafter the court determined to reserve judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1962.

[1] Petitioner's citation (Pet. 25) of False Claims Act cases disposed of on a motion to dismiss in no way supports the proposition that he seeks to sustain here, *i.e.*, that the deferral of a ruling on the motion to dismiss amounts to a denial of constitutional due process. Indeed in *Rennie & Laughlin, Inc.* v. *Chrysler Corp.*, 242 F. 2d 208, 213 (C.A. 9), the court noted that motions to dismiss are inappropriate where facts must be developed and the claim is not frivolous. Here, of course, there were substantial questions of fact to be resolved, concerning the statements of Fong and others with regard to scrapping of the vessels.

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